Remarks[*] by Marcelo Kohen[†]

I would like to thank the organizers for inviting me to participate in this important conference. I have to say that I was initially a little reluctant to accept their invitation because I was not immediately tempted by the prospect of working on the 1st of May. However, my decision to accept their invitation was motivated by the realization that the struggles for social justice and for peace are closely related, and that one cannot have the one without the other. Also, I have to say that I am not here in my capacity as a professor of international law, but as a person who has been committed to the struggle for peace since an early age.

When I read the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* for the first time, I reacted in a very strong way. I wrote two articles that were very critical of the Advisory Opinion.[1] I was particularly critical of this novel invention of the fundamental right of all States to survival, which was the element that allowed the Court to conclude it was not sure whether there was a general prohibition against the use of nuclear weapons.[2]

Today, my views remain critical because of this essential point of the argument made by the Court of State survival, and because of the indecision of the Court and its invocation of a purported "uncertainty". A new regard for the Advisory Opinion nevertheless allows me to find that there are also very important and positive aspects in the Opinion, and I think we are dealing here with one of the most important ones—that is, the obligation to negotiate in good faith a nuclear disarmament. We know that, even if unanimity was reached on this point, for some judges, this was a kind of *ultra petita*.[3] I can understand the position of the Court. In my view, it is *ultra petita* if one considers, as I consider, and I think all of you consider, that the potential use of nuclear weapons is contrary to the cardinal principles of international humanitarian law, such as the principles of distinction, proportionality, and the obligation not to cause unnecessary suffering. However, since the Court reached this uncertain answer, I think there is room to consider that its finding that States must negotiate a nuclear disarmament in good faith was not *ultra petita*; since the Court could not reach a decision on the legality or the illegality of the use of nuclear weapons in all circumstances, it considered that the best way to put an end to this uncertainty would be to bring to a successful conclusion negotiations leading to nuclear disarmament in all its aspects, under strict and effective international control.

My task is to talk about good faith in general. It is very difficult to add something interesting after President Bedjaoui's remarkable speech. My idea is just to make some ancillary remarks to what has already been said. As President Bedjaoui mentioned, good faith is an elementary and indispensable tool in the relationship among members of any community, either human beings or States. In German this principle is called *Treu und Glaube* and I think this reflects better the very idea of the principle. Confidence, trust, belief – these are the essential elements of the principle of good faith. Indeed, in any society it is impossible to interact with

---

[*] Edited transcript.

[†] Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, and Associate Member of the Institut de Droit International. He is rapporteur on matters related to state succession for the International Law Association and the Institut de Droit International, and Director-General of the Latin-American Society of International Law. Professor Kohen is counsel for various states before the International Court of Justice. He is author, among other publications, of *Possession contestée et souveraineté territoriale* (1997), which was awarded the Paul Guggenheim Prize.

one another if one cannot assume that the other recognizes the existence of some rules, and feels obliged or committed to respect these existing rules.[4]

Although present everywhere in international law, good faith is not in itself a source of obligation, where none would otherwise exist, as the Court stated in the *Border and Transborder Armed Action case* (*Nicaragua v. Honduras*) in 1988,[5] or more recently, 10 years ago, in the *Land and Maritime Boundary (Cameroon v. Nigeria).* I quote the Court again, "the principle of good faith, and the rule *pacta sunt servanda*…relate only to the fulfillment of existing obligations."[6] This is not a problem for the topic we are dealing with here, because there is an existing obligation. It is contained in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[7] as was recalled frequently this morning.

Good faith is a general principle of law, and as such it is present at all stages of the legal process. It is present in negotiations. It is present in the adoption of treaties, and other instruments. It is present in the implementation of treaties and customary rules. It is present in the interpretation of legal rules. Good faith not only applies to treaties, it also applies, as I said, to customary rules. Let me just recall that the principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter is enshrined as one of the principles in the Friendly Relations Declaration embodied in General Assembly Resolution 2625.[8] There are explicit references to good faith in the Vienna Convention on the Law of Treaties, as we know, and Articles 26 and 31 were mentioned here. I will not dwell on them here.

Let me just say something else about Article 18 of the Vienna Convention on the Law of Treaties, namely the obligation not to defeat the object and purpose of a treaty prior to its entry into force. Here there is a distinction between what the International Law Commission proposed, and what the Vienna Conference decided, in 1969. The International Law Commission had proposed something broader than the provision not to defeat the object and purpose of the treaty prior to its entry into force that was eventually incorporated in the Convention. The Commission had proposed to extend that obligation to the period of negotiations as well. This point is mentioned by some authors who have interpreted the Advisory Opinion of 1996, and in particular operative paragraph (2)F, as a way to deny what the Court said in paragraphs 99 and 100 of the Advisory Opinion.[9] According to the Court, by virtue of Article VI of the NPT, there is not only an obligation to negotiate, but also an obligation to conclude an agreement on nuclear disarmament. Some authors have argued that this distinction between the ILC draft and Article 18 as adopted by the Vienna Conference demonstrates that Article VI does not contain an obligation to conclude such an agreement.[10] In my view this is not so, because Article VI of the NPT explicitly provides that negotiations must be undertaken with the aim of concluding a future treaty. It would be unthinkable to even imagine that nuclear disarmament can be reached without the adoption of a treaty. There must be a treaty, and this is an outcome of negotiations on nuclear disarmament that is explicitly mentioned in Article VI: "a treaty on general and complete disarmament under strict and effective international control". Thus the obligation embodied in Article 18 of the Vienna Convention is perfectly applicable to Article VI of the Non-Proliferation Treaty.

Speaking of Article VI, there was a discussion within the Court, from my reading of the different judges' opinions, about the customary nature of Article VI.[11] So it is obvious that all States parties to the Non-Proliferation Treaty are bound by Article VI, but what about the others? This is also a very important point. If we want to achieve general nuclear disarmament, it is clear that States that are not parties to the NPT must also participate in the negotiations and must be bound by the treaty that would result as an outcome of these negotiations. In my view, and I

fully agree with what President Bedjaoui stated in his declaration,[12] Article VI has a customary character, contrary to what Judge Shi indicated in his declaration.[13] In my view, if one applies the *North Sea Continental Shelf* judgment of the Court with regard to customary rules,[14] one comes to the conclusion that the content Article VI of the NPT reflects customary law, or has become customary law. First of all, there is the impressive number of States parties to the NPT, and the large and diverse segments of the world they represent. And, consistent with what the Court said in 1969 in *North Sea Continental Shelf*,[15] States belonging to all geographic and other groups of States are parties to the NPT. There is also the fact that States which are not parties to the NPT have not expressly opposed such aims toward the idea of negotiations. This is also, in my view, a very important point.

If we come to the content of Article VI of the NPT, I would admit with some caution that the first of the three points mentioned by Article VI does not have the same relevance as it had during the Cold War period. Article VI begins with the statement that "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date." The two further points concern nuclear disarmament. For the reasons that we all know, the prospect of a nuclear arms race is not a topic of critical importance as it was during the Cold War. Today the focus is rather on the problem of horizontal proliferation. I think the best way to deal with the problem—it is a real problem—is through the negotiations of a general nuclear disarmament. If we are to remain consistent with the idea that nuclear weapons cannot be used in a way that would respect international humanitarian law, then it follows as a logical consequence that there must be a specific prohibition, as is the case for other weapons in the similar situation.[16]

It is useful to compare the obligation of Article VI of the NPT to the obligations of Articles 74 and 83 of the United Nations Convention on the Law of the Sea. The two UNCLOS articles have the same content, the first with respect to exclusive economic zones, the second with respect to the continental shelf. Article 74, "Delimitation of the exclusive economic zone between States with opposite or adjacent coasts," provides:

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

There are obvious differences between the obligation for States to reach an equitable solution in the delimitation of the economic exclusive zones or the continental shelf, and Article VI of the NPT. There cannot be a third party settlement if negotiations on nuclear disarmament do not reach any result—obviously. Nuclear disarmament requires a treaty; States cannot resort to other means of settlement of disputes.

Another instructive comparison would be to Article 77 of the UN Charter, as interpreted by the Court in its advisory opinion on the *International Status of South-West Africa*.[17] While

one can criticize the Court's holding that there is no obligation to transform a mandate into a trust territory, the non-optional character of Article VI is in clear contrast with the wording of Article 77 that the "trusteeship system shall apply to such territories…as may be placed thereunder by means of trusteeship agreements".

What does it mean then that "each of the Parties to the Treaty undertakes to pursue negotiations in good faith" on nuclear disarmament? It means that there is an obligation to conduct negotiations in order to conclude a treaty aiming at general and complete nuclear disarmament. This obligation to conclude implies that there must be an agenda; there must be concrete negotiations over a reasonable period of time; and there must be a given kind of conduct during negotiations that is consistent with the established aim of the negotiations.

To finish my short intervention, I would like to recall some forgotten words written more than 60 years ago in a very important document. This important document begins with "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." I think that efforts towards achieving nuclear disarmament constitute a fundamental and historical cornerstone in the work to save future generations from the scourge of war.

---

[1] 'The Notion of State Survival in International Law', in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 293-314; 'L'avis consultatif de la C.I.J. sur la Licéité de la menace ou de l'emploi d'armes nucléaires et la fonction judiciaire', *European Journal of International Law*, 1997, vol. 8, pp. 336-362.

[2] A very slim majority of the Court, determined by the casting vote of the President, held in operative paragraph (2)E of the Advisory Opinion that "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake": *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, p. 266, para. 105.

[3] This was the position of Judge Guillaume in his Separate Opinion, at pp. 292-293, para. 13, and Vice-President Schwebel in his Dissenting Opinion, at p. 329.

[4] Roger Cotterrell emphasizes the importance of trust in a community when he writes "community is not, as generally understood, a matter of quickly entered and quickly disconnected relations. It is, typically, slowly and steadily built. The key characteristics of such gradually evolved relations is that they are imbued with a high degree of *trust*, which, in general, can only be securely built over time, with the accumulated experience of past interactions. Trust encourages future interaction and provides the motivation to engage in relatively free, uncalculated relations with others": Roger Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory*, Aldershot, Ashgate, 2006, p. 73 (original emphasis). For good faith in international law in general, see Robert Kolb, *La bonne foi en droit international public*, Paris, PUF, 2000.

[5] *Border and Transborder Armed Action* (*Nicaragua v. Honduras*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, para. 94 ("The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests*, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.").

[6] *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, para. 59.

[7] Washington, London, Moscow, 1 July 1968, entered into force on 5 March 1970. On 11 May 1995, in accordance with article X, paragraph 2, the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons decided that the Treaty should continue in force indefinitely. Article VI provides "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to

cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

[8] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971), adopted by consensus on October 24, 1970, p. 121.

[9] "99. …the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament…The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. 100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament necessitates the co-operation of all States": *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, pp. 263-264, paras. 99-100.

[10] Gilles Cotterau, 'Obligation de négocier et de conclure', in Société française pour le droit international, *Le droit international des armes nucléaires*, Paris, Pedone, 1998, pp.169-171.

[11] See *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, pp. 264-265, paras. 102-103; Declaration of President Bedjaoui, pp. 273-274, para. 23; *Contra* Declaration of Judge Shi, pp. 277-278; Dissenting Opinion of Judge Schwebel, p. 329.

[12] Declaration of President Bedjaoui, pp. 273-274, para. 23.

[13] Declaration of Judge Shi, pp. 277-278.

[14] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 44, para. 77.

[15] *Id.* para. 73.

[16] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980, entered into force 2 December 1983; Protocol I on Non-Detectable Fragments to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980, entered into force 2 December 1983; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980, entered into force 2 December 1983; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980, entered into force 2 December 1983; Protocol IV on Blinding Laser Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Vienna, 13 October 1995, entered into force 30 July 1998; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 2 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 3 May 1996, entered into force on 3 December 1998; Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Convention weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 21 December 2001, entered into force on 18 May 2004; Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), Geneva, 28 November 2003, entered into force on 12 November 2006; Convention on the Prohibition of the Development,

Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992, entered into force on 29 April 1997; Convention on Cluster Munitions, Dublin, 30 May 2008, not yet in force.

[17] I.C.J. Reports 1950, p. 128.